2004

State of Utah v. Mazhar Tabesh : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, vs. MAZHAR TABESH, Defendant/Appellant.	)	APPELLANTS' OPENING BRIEF Case No. 20040358-CA

APPELLANT'S APPEAL FROM A CONVICTION ON ONE COUNT OF AGGRAVATED ARSON, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANNOTATED §76-6-103. SAID CONVICTION OCCURRED IN THE FOURTH JUDICIAL DISTRICT COURT, WASATCH COUNTY, STATE OF UTAH, THE HONORABLE JUDGE DONALD J. EYRE PRESIDING.

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ORAL ARGUMENT REQUESTED

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LIST OF PARTIES IN THE COURT BELOW

The following is a complete list of the parties in the proceedings before the Fourth Judicial District Court:

JUDGE

The Honorable Donald J. Eyre presided over the case against Mr. Tabesh.

PARTIES

State of Utah, plaintiff, represented by Thomas L. Lowe, Wasatch County Attorney.

Mazhar Tabesh, defendant, represented in the Fourth District Court by Ronald J. Yengich, Attorney at Law.

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STATEMENT OF JURISDICTION

This is an appeal from a judgment and conviction concerning Mazhar Tabesh ("Appellant") for Aggravated Arson, a First Degree Felony, in violation of Utah Code Ann. § 76-6-103. (Rec. at 3-5, 215, 220-226; Add. I; Add. II).

This Court obtains jurisdiction to hear this appeal of a criminal case involving a first degree felony, pursuant to Utah Code Ann. § 78-2a-3(2)(j). This case was transferred from

the Utah Supreme Court to the Utah Court of Appeals pursuant to Utah Code Ann. §78-2-2(4)

All of the issues raised herein were appropriately preserved through timely motions at trial or through Appellant's Motion for New Trial.

ISSUES PRESENTED AND STANDARD OF REVIEW

1. WHETHER SUFFICIENT EVIDENCE WAS ADDUCED AT TRIAL TO SUSTAIN THE JURY'S CONVICTION ON ONE COUNT OF AGGRAVATED ARSON, A FIRST DEGREE FELONY?

In a jury trial, the jury serves as the exclusive judge of both the credibility of witnesses and the weight to be given particular evidence. This court reverses a jury verdict only if, after viewing all the evidence and inferences therefrom in the light most favorable to that verdict, it finds the evidence "sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted." *State v.* Baker, 963 P.2d 801 (Utah Ct. App. 1998), *citing State v. Span*, 819 P.2d 329, 332 (Utah 1991)(other citations omitted).

This issue was appropriately preserved in part through Appellant's motion to dismiss at the close of the prosecution's case. (Vol. IV at 63).

2. WHETHER THE STATE ENGAGED IN PROSECUTORIAL MISCONDUCT WHERE THE PROSECUTION URGED THE JURY TO INFER GUILT THE FACT THAT THE DEFENSE DID NOT ADMIT FINANCIAL RECORDS INTO EVIDENCE?

This Court will not reverse a trial court's denial of a mistrial motion based on prosecutorial misconduct absent an abuse of discretion. *State v. Pritchett*, 69 P.3d 1278 (Utah 2003); *State v. Harmon,* 956 P.2d 262 (Utah 1998). This standard is met where "'the error is substantial and prejudicial such that there is a reasonable likelihood that in its absence, there would have been a more favorable result for the defendant.'" *Id.* at 276.

This issue was appropriately preserved through timely objection and Appellant's motion for new trial. (Vol. IV at 200-201; Rec. at 279-81; Add. III).

3. WHETHER IT CONSTITUTED ERROR TO ADMIT AN INCONCLUSIVE SCIENTIFIC COMPARISON BETWEEN PAINT THINNER FOUND AT THE SCENE AND PAINT THINNER PURCHASED FROM A STORE WHERE SAID COMPARISON WAS IRRELEVANT AND OTHERWISE INADMISSIBLE UNDER RULES 403 AND 702 OF THE UTAH RULES OF EVIDENCE.

"The admissibility of an item of evidence is a legal question." *Jensen v. Intermountain Power Agency*, 977 P.2d 474 (Utah 1999). "However, the trial court has a great deal of discretion in determining whether to admit or exclude evidence, and its ruling will not be overturned unless there is an abuse of discretion." *Gorostieta v. Parkinson*, 17 P.3d 1110

(Utah 2000); *citing State v. Pena,* 869 P.2d 932, 938 (Utah 1994); *State v. Sutton,* 707 P.2d 681, 684 (Utah 1985).

This issue was preserved through Appellant's timely objection. (Vol. IV at 16-20).

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The following relevant constitutional provisions, statutes and rules are referred to in Appellants' Brief and are reproduced at Addendum VI: Utah Code Annotated § 76-6-103, § 78-2a-3, § 78-2-2; Rule 23 of the Utah Rules of Criminal Procedure; and Rules 403, 701, and 702 of the Utah Rules of Evidence.

STATEMENT OF THE CASE

A. Nature of the Case

An Information filed on or about September 19, 2002, charged Appellant with one count of Aggravated Arson, a first degree felony. (Rec. at 4-5; Add. VII, p. 1).

B. Course of Proceedings

On April 23, 2003, Appellant filed a motion to dismiss arguing that the State, at the preliminary hearing, failed to establish probable cause that Appellant committed the crime charged. (Rec. at 68, 64). At trial, at the close of the prosecutions case in chief, Appellant moved to dismiss the case on the grounds that the State was unable to produce

sufficient evidence to establish a prima facie case. (Vol. IV at 63)[1]. Finally, after the jury returned a guilty verdict, Appellant filed a motion for a new trial on the grounds that the State had engaged in prosecutorial misconduct. (Rec. at 260, 256; Add. III). This motion was ultimately denied on June 25, 2004. (Rec. at 369; Add. IV). A Notice of Appeal was timely filed on June 30, 2004. (Rec. at 371-373; Add. V).

C. Disposition in Trial Court

Appellant was found guilty of Aggravated Arson on February 12, 2004, following a jury trial. (Vol. IV at 248). He was sentenced on April 29, 2004, to an indeterminate term of not less than five years and up to life in prison. (Sent. Tr. at 20). However, the Court suspended the prison term and placed Appellant on probation. The Court ordered the following conditions of probation: Appellant was to serve one year in the Wasatch County Jail, where he was to be eligible for work release after 90 days; subsequent to his release from jail, he was ordered to contact Adult Probation and Parole, who would

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[1]The jury trial transcript in the instant case comprises five volumes. The volume detailing proceedings on February 9, 2004, shall be referred to as Vol. I. The volume detailing proceedings on the morning of February 10, 2004, shall be referred to as Vol. IIA. A separate volume was created for this part of the proceedings because a court reporter was not initially available. (Vol. II at 1). The volume detailing events of the afternoon of February 10, 2003 shall be referred to as Vol. IIB. The two volumes recording proceedings on February 11 and 12 shall be referred to as Volumes III and IV respectively.

supervise the remainder of his probation. (Sent. Tr. at 20). In addition, the Court further ordered Appellant to pay restitution in the amount of $135,444.00 and a fine in the amount of $1,000.00. (Sent. Tr. at 20). Appellant filed a timely Notice of Appeal on June 30, 2004. (Rec. at 371-373; Add. V).

D. Statement of Material Facts

Mr. Tabesh, (Appellant) moved to the United States from Pakistan in 1981 with his wife Samina. (Vol. IV at 106). He attended and graduated from Skyline College and, at the time of trial, had been working for Wells Fargo Bank for eight-and-a-half years. (Vol. IV at 107). In addition to his career with Wells Fargo, Mr. Tabesh also owned and operated the Alpine Lodge Motel (hereinafter "The Lodge"). (Vol. IV at 109). Despite gaining his citizenship in 1993, he and his wife had been the brunt of several racially motivated threats; people had spat on windows and several anonymous callers told them "to go back where they came from." (Vol. III at 170; Vol. IV at 149). On July 21, 2002, The Lodge was allegedly set on fire intentionally. (Vol. IIB at 184).

THE FIRE

At approximately 11:30 p.m. on July 21, 2002, Burke Winget left his house to buy a drink from a convenience store. (Vol. IIB at 7). While en route, he drove through a patch of smoke near The Lodge and observed smoke coming out of the air conditioner on top of

the building. (Vol. IIB at 7, 8). Mr. Winget parked his car and found Mr. Tabesh near the office. (Vol. IIB at 9). Mr. Winget informed him of his observations and Mr. Tabesh purportedly remained calm and answered all of his questions. (Vol. IIB at 11). Mr. Tabesh indicated that someone was staying in room 112, which was in the vicinity of the smoke. (Vol. IIB at 12, 131). Mr. Winget instructed Mr. Tabesh to call 9-1-1 while he checked the room. (Vol. IIB at 12). On his way to room 112, he noticed that the stairwell to the top floor was covered in black smoke and that flames were present at the top of the stairs. (Vol. IIB at 13). As Mr. Winget knocked on room 112, he purportedly noticed Mr. Tabesh standing behind him. (Vol. IIB at 15). Mr. Winget asked Mr. Tabesh to call 9-1-1. (Vol. IIB at 15). However, Mr. Tabesh testified that he did not follow Mr. Winget to room 112 but, instead, ran out to see how bad the fire was, and then immediately ran back into the office to call 9-1-1. (Vol. IV at 136-37).

As Mr. Winget knocked on room 112, he noticed three people walk across the parking lot. (Vol. IIB at 16). A young woman, who was later determined to be Mr. Tabesh's wife, was hysterical and screaming, "my husband, my husband." (Vol. IIB at 16). Mr. Winget initially testified that "there was no doubt she was pointing to room 112 while she was screaming;" however, he later testified that she was pointing in the direction of room 112, and he could not say with any degree of certainty that that was where she intended to point.

(Vol. IIB at 33-34). In addition, the stairs which lead to Mr. Tabesh's apartment were only 10 feet away from room 112. (Vol. IIB at 34, 52).

While Mr. Winget continued to knock on the door to room 112, Mr. Tabesh's father-in-law retrieved a fire extinguisher for him. (Vol. IIB at 21). At this point, Mr. Tabesh had returned from the office and Mr. Winget instructed him to open room 112 and see if anyone was in the room; meanwhile, he proceeded up the stairs to the fire. (Vol. IIB at 22). Upon reaching the top of the stairs, he pointed the extinguisher at the flame and put out the fire. (Vol. IIB at 23). At this point, the fire department had arrived and Mr. Winget deferred further action to them and went to the ambulance where he received oxygen. (Vol. IIB at 24).

POLICE RESPONSE

Officer Allred was first police official to arrive at the scene and he initially began directing traffic. (Vol. IIB at 72, 73). Deputy Graves arrived shortly thereafter and began assessing the scene. (Vol. IIB at 109-110). Deputy Graves met Mr. Tabesh who informed him that someone had checked into room 112. (Vol. IIB at 111). Deputy Graves began pounding on the door and indicated that he was going to kick the door down. (Vol. IIB at 112). However, Mr. Tabesh said he could get a key for the officer. (Vol. IIB at 112.) Mr.

Tabesh returned in a matter of seconds with the key; he unlocked the door and pushed it open. (Vol. IIB at 113, 129).

Deputy Graves entered the room and briefly looked around to determine whether anyone was in the room. (Vol. IIB at 115). He noticed a small fire but did not see anyone in the room. (Vol. IIB at 115). He also noted that the fire alarm was not sounding. (Vol. IIB at 115). After he exited the room, he realized that Sergeant Jeff Winterton had arrived from the fire department. (Vol. IIB at 116). He advised Sergeant Winterton about of the fire and subsequently went in with a fire-hose and put it out. (Vol. IIB at 117).

Deputy Graves waited by the door with Mr. Tabesh and asked him to get any information on the individual who had checked into the room. (Vol. IIB at 118). Mr. Tabesh informed him that he had no ID or credit card information but he pointed to a yellow receipt that was located on the night stand and indicated that it was the individual's receipt. (Vol IIB at 118). Deputy Graves could not immediately see the receipt, but he and Sergeant Winterton approached the night stand and found the receipt folded up on the corner. (Vol. IIB at 120). The officers attempted to open the receipt, placing one gloved finger on the corner and flicking it open with a pen. (Vol. IIB at 145). Eventually they opened the receipt enough to determine it was illegible. (Vol. IIB at 145). At that point, Sergeant Winterton realized there

were pour spots and matches on the bed so he directed everyone to exit the room. (Vol. IIB at 146).

Deputy Graves retrieved Officer Allred because he was jurisdictionally permitted to investigate the case; meanwhile, Sergeant Winterton remained in the room. (Vol. IIB at 122, 147). Officer Allred secured the room with police-tape and photographed it. (Vol. IIB at 76-77). The receipt on the night stand was visible in the photographs that were taken from the doorway. (Vol. IIB at 77). Officer Allred then proceeded to the office with Mr. Tabesh where he was given the original copy of the receipt and the four ten-dollar bills that the individual used to pay for the room. (Vol. IIB at 79). He asked Mr. Tabesh to put both items into evidence bags. (Vol. IIB at 81).

Both Sergeant Winterton and Deputy Graves testified that they never gathered any evidence from room 112. (Vol. IIB at 121, 148). Officer Clegg, who arrived on the scene close to midnight, testified that he and Officer Allred returned to room 112 sometime after his arrival and collected the receipt that was located on the night stand. (Vol. III at 48). In addition, he testified that he put on a new pair of gloves and collected a taco shell bag that was located near the receipt and placed it in an evidence bag. (Vol. III at 49). However, this testimony was contrary to that of Mr. Tabesh, who indicated that, in addition to the receipts from the office, he was "certain" that Officer Graves had him go into the room and get the

receipt off the night stand. (Vol. IV at 134). The officers also located a one-gallon plastic jug that appeared to have been used to pour gasoline in the upstairs hallway; it was collected with gloves and bagged into evidence. (Vol. IIB at 83; Vol. III at 47). Officers also analyzed the smoke detector and determined it was not working because the battery had slid back away from the contact prongs; it was in the smoke detector, but it was not making the necessary contact for it to be operational. (Vol. III at 56). The officers later discovered that the batteries in the smoke detectors of rooms 109, 110 and 111 all failed to make contact with the batteries in this manner. (Vol. III at 97-98).

Lane Clyde and Mark Luke arrived from the fire department and entered the upstairs of The Lodge through room 117. (Vol. IIB at 151, 157). Mr. Clyde headed left down the hall and forced his way into room 121 where he found the fire alarm knocked off the ceiling and laying on the floor. (Vol. IIB at 152-53). Mr. Luke headed right down the hall and disabled a fire alarm that was sounding in room 114. (Vol. IIB at 157-58).

THE INVESTIGATION

Jim Dudzinski arrived at close to 8:00 am on July 22, 2002 as the assigned arson investigator for the case. (Vol. IIB at 160). First, he observed several pour patterns around the hotel. (Vol. IIB at 165-167). He noticed pour patterns in the back closet of room 112;

on the bed in room 112; and in front of several doors in the upstairs hall. (Vol. IIB at 165-167).

Investigator Dudzinski testified that, in his expert opinion, an accelerant was poured upstairs in front of several of the doors and then connected with a trailer. (Vol. IIB at 178). The individual then stood at the top of the stairs and threw a match in both directions down the hall and escaped down the stairs. (Vol. IIB at 178). However, despite the use of the accelerant, the upstairs fire was eventually extinguished because it did not have enough oxygen to sustain itself. (Vol. IIB at 174). If there had been more oxygen available to the fire, it would have likely burned the entire building down, including the area where Mr. Tabesh's wife and extended family were staying. (Vol. IIB at 174, 190).

Investigator Dudzinski also testified that all of the pour spots, including those upstairs and in room 112, could have been made from the container of gasoline that was recovered from the upstairs hallway. (Vol. IIB at 175). Furthermore, he could not determine whether the fire in room 112 was started before the fire upstairs, or if they were started at the same time by two individuals. (Vol. IIB at 184, 191). Regardless, neither fire was burning for more than 5-15 minutes. (Vol. IIB at 185).

Finally, Investigator Dudzinski was also advised that the arson was possibly a hate crime. (Vol. IIB at 187). He did not find any indication that the arson was the result of a

hate crime; however, he conceded that, even in hate crimes, messages are not always left and sometimes the arson itself is intended to be the message. (Vol. IIB at 187, 189).

THE GUESTS

Mr. Tabesh described the man who had checked into room 112 to police in an interview conducted with the Heber City Police Department. (Vol. III at 60.) He was described as a Caucasian, 30-year-old man, wearing a gray T-shirt and blue jeans with a black backpack and dark shoulder-length hair. (Vol. III at 61). Mr. Tabesh indicated that the man came into the room and filled out a registration form without any specific requests. (Vol. III at 60). With Mr. Tabesh's help, the officers were able to make a composite drawing to compare with people in their database; unfortunately, no matches were found. (Vol. III at 62-63). In addition, the officers showed the sketch to Ms. Woolstenhume because she had reported a suspicious male in her store asking questions about The Lodge on an earlier occasion; unfortunately, she was unable to connect the two individuals. (Vol. IIB at 24).

In addition, the guest scribbled his name on the registration form such that it was illegible. (Vol. III at 67). While records indicate that Mr. Tabesh takes information from an ID when the receipt is illegible, this particular guest stated that he did not have any ID and Mr. Tabesh did not think it unusual for guests to become "sloppy" with their writing because they are often in a hurry or tired. (Vol. III at 63; Vol. IV at 127). Two more guests checked

into the hotel approximately one hour later; however they made specific requests concerning the room and so Mr. Tabesh placed them in room 106 to accommodate those needs. (Vol. III at 79).

THE EVIDENCE

Sergeant Perry had an opportunity to interview Mr. Tabesh on one occasion. (Vol. III at 231). In that interview, Mr. Tabesh purportedly indicated that he had gone down to the basement to adjust the heat for the guests in room 106. (Vol. III at 232). Consequently, Sergeant Perry investigated Mr. Tabesh's basement where he found two cans of paint thinner: Clean Strip and EZ Paint Thinner. (Vol. III at 232). These two items were sent to the crime lab and analyzed, but have subsequently been lost. (Vol. III at 253).

Jennifer McNair is a chemist for the state crime lab and analyzed several carpet samples that were sent to her from The Lodge. (Vol. IV at 5, 6). Gasoline was detected on several of the patches from the upstairs hallway. (Vol. IV at 11-13). The carpet from the closet of room 112 showed signs of a petroleum distillate, which is a refined crude oil such as paint thinner, charcoal lighter or dry cleaning solvent. (Vol. IV at 13). She compared the chemical composition of the accelerant found on the carpet sample from room 112 with the two jugs of pain thinner collected from Mr. Tabesh's basement. (Vol. IV at 15). The first jug, which contained Clean Strip, did not match the accelerant used in room 112. (Vol. IV

at 15). The second jug, which contained EZ Paint Thinner, did not contain enough contents to run a comparison. Another can of EZ Paint Thinner was bought and compared with the accelerant used in room 112. (Vol. IV at 16). However, the results were inconclusive, thus she could not determine that the EZ Paint Thinner matched the accelerant used in room 112, nor could she exclude it as a possibility. (Vol. IV at 23).

Elisa Macken is a fingerprint analyst for the State Crime Lab. (Vol. IV at 25). She first explained several of the factors that may affect why some people do or do not leave fingerprints. (Vol. IV at 31). She was given several items from The Lodge to analyze for fingerprints. (Vol. IV at 32). She found a fingerprint on the telephone in room 112, but it did not match Mr. Tabesh, any of his family, or any of the investigating officers. (Vol. IV at 35). However, the print was not clear enough for her to send through the Automated Fingerprint Identification System, so it remained unidentified. (Vol. IV at 37). There were no prints found on the room key for room 112; on an opened soap wrapper that was found in the garbage; on the battery from the smoke detector; on the pen used to sign the receipt; on the ten dollar bills used to pay for the room; or on the plastic jug that was recovered from the upstairs hallway. (Vol. IV at 38-44).

However, Ms. Macken testified that she was able to detect three fingerprints on the back of the yellow receipt found in Room 112. (Vol. IV at 47). In addition, she found two

of Mr. Tabesh's fingerprints on the white receipt which was located in his office. (Vol. IV at 50, 52). Mr. Tabesh would have handled both of these items in his regular course of business. (Vol. IV at 126; Vol. IIB at 94). She also found three fingerprints that belonged to Mr. Tabesh on the taco shell package that was sitting on the nightstand. (Vol. IV at 55-56). However, Mr. Tabesh testified that he picked up the taco bag and moved it to retrieve the receipt from the nightstand. (Vol. IV at 134). The fingerprints were consistent with someone picking up the taco shell bag. (Vol. IV at 55-56). In addition to Mr. Tabesh's fingerprints, Ms. Macken found an additional fingerprint that had insufficient ridge definition to match it to anyone in particular. (Vol. IV at 55). Finally, she found one thumbprint of Mr. Tabesh's on the doorknob to room 112. (Vol. IV at 56). However, this is consistent with the fact that Mr. Tabesh opened the door for Deputy Graves. (Vol. IIB at 113).

Aside from this physical evidence, that was collected and analyzed, Mr. Tabesh's clothing was never analyzed. (Vol. IIB at 96). His clothing was never analyzed despite the fact that Investigator Dudzinski indicated that it was likely that the person who poured the accelerant would have gotten some of it on their clothing or shoes. (Vol. IIB at 195). Despite the fact that several officers testified they never smelled any gasoline on Mr. Tabesh, it was still important to analyze his clothes. (Vol. IIB at 96; Vol. III at 144; Vol. IIB at 207).

EYEWITNESS OBSERVATIONS

Steve Heaps and his daughter had driven down the road to observe the fire when they noticed two individuals on top of a neighboring business roof. (Vol. IV at 74). They drove toward the business and when the car pointed towards them, the two men jumped off the roof into a white Camero-type car and drove away. (Vol. IV at 75). Mr. Heaps identified the individuals as Caucasians between 18-25 years old. (Vol. IV at 77). However, at that time Mr. Heaps didn't realize the fire was due to arson and, consequently, he didn't make a detailed observation. (Vol. IV at 85). The next morning, Ms. Woolstenhulme confirmed that her garbage can had been moved to allow someone access to the roof. (Vol. III at 16). Officer Clegg testified that it is possible to go from building to building along the rooftops, but there would be some long jumps required. (Vol. IIB at 117). The Heber City Police Department conducted a search to find a white Camero that would possibly have young drivers, but the search did not produce any results. (Vol. IIB at 122).

THE LODGE

Mr. Tabesh originally took out a loan for The Lodge in the amount of $460,000.00. (Vol. III at 28). He paid a down payment of $108,000.00 and his monthly payments on the loan were approximately $4,300.00. (Vol. III at 28, 32). Mr. Tabesh made every loan payment up until the time of the fire. (Vol. III at 34).

Mr. Tabesh had originally bought The Lodge so that his in-laws and their family could run the business and keep themselves busy. (Vol. IV at 110). Unfortunately the family was delayed in coming to the United States and Mr. Tabesh decided to put The Lodge up for sale. (Vol. IV at 113). He wanted to start to focus on having his own family, and he did not want his wife to have to worry about running the hotel while he was occupied with his other job. (Vol. IV at 113). In November of 1999, he received an offer for $650,000.00 from Craig and Jan Winter but just before the sale was finalized Craig was diagnosed with cancer and the sale was not completed. (Vol. IV at 114-15). Mr. Tabesh took the property off the market for a short while to see if Craig recovered; unfortunately he did not recover. (Vol. IV at 115).

Mr. Tabesh eventually put the property back on the market in August of 2000 with an asking price of $679,000.00. (Vol. I at 165). Bijan Fakhrieh, the real estate agent for The Lodge, felt the asking price was "a little bit high." (Vol. I at 165). However, it is not uncommon to overvalue the property in hopes of making a profit. (Vol. I at 173). There was never an offer made on The Lodge during that year, however, the company did have at least four potential buyers. (Vol. I at 169, 174).

Sergeant Perry performed an analysis of all the receipts for 2001 and 2002 that the police department had collected from Mr. Tabesh's office in order to determine how much

money Mr. Tabesh was making on The Lodge. (Vol. III at 235). He found that for some months Mr. Tabesh exceeded his monthly loan payments and for some months he did not. (Vol. III at 239). While his profits may not have been the $70,000.00 he had estimated them at, he still exceeded his payments and made a profit each of those years. (Vol. III at 240, 251). In addition, Mr. Tabesh testified that all of the receipts were not kept in the office because his father-in-law takes care of the bookkeeping and some of the receipts were in his apartment. (Vol. IV at 117).

INSURANCE

John Michael Sullivan was the Insurance Agent for The Lodge. Mr. Tabesh came to him in June of 1999 looking for some competitive insurance quotes. (Vol. IIA at 13). He found a fair rate through E.M.C. and Mr. Tabesh accepted the offer on July 15, 1999. (Vol. IIA at 14, 15). Every year Mr. Sullivan would send Mr. Tabesh a print out of a comparison showing any changes from one year to the next. (Vol. IIA at 18). The print out included a break down of the coverage for each building of The Lodge. (Vol. IIA at 19). For the first two years, Mr. Tabesh's premiums stayed level, the third year it went up $90.00, and the fourth year it went up another $128.00. (Vol. IIA at 21). Mr. Tabesh asked to discuss his rates with Mr. Sullivan. (Vol. IIA at 20). In preparing for this discussion, Mr. Tabesh noticed that two of the buildings' premiums had mistakenly been switched. (Vol. IIA at 22).

The listed value of the South building pertained to the North building and vise versa. (Vol. IIA at 22). Mr. Sullivan agreed with his assessment and confirmed that the premiums had been accidentally switched since the beginning. (Vol. IIA at 22). Switching the premiums to their original design increased coverage on the North building by $70,000.00 and decreased coverage on the South building by $56,000.00. (Vol. IIA at 30). This was to be expected because the North building housed his residences, his office, and the better units. (Vol. IIA at 40). In addition, while he was in the office, Mr. Tabesh also insured a canopy, that had not previously been covered, for $10,000 and also discussed the need for separate insurance on his personal belongings. (Vol. IIA at 24).

The canopy was damaged in October of 2001 when a moving company ran into it. (Vol. IIA at 27). Mr. Tabesh filed a claim, E.M.C. agreed to pay the claim on the canopy; however, they were eventually reimbursed by the mover's insurance. (Vol. IIA at 28). In reality, the canopy was not covered by Mr. Tabesh's insurance because it was a separate structure and needed to be insured on its own to guarantee coverage. (Vol. IIA at 30). Therefore, Mr. Tabesh paid an extra $89.00 to insure the canopy for $10,000.00.

Mr. Tabesh also insured his personal items for $31, 600.00. (Vol. IIA at 26). He paid an additional $148.00 a year to insure his personal belongings. (Vol. IIA at 26). While his personal items were not previously covered, it is not uncommon for people to believe that

personal items located at their business are covered by their commercial insurance. It is not until they learn otherwise that they realize there is a need for personal insurance. (Vol. IIA at 34). Mr. Tabesh brought up the question about whether his personal property was covered, but it was Mr. Sullivan who persuaded him to purchase the insurance. (Vol. IIA at 35). Mr. Sullivan testified that there was nothing unusual about Mr. Tabesh's behavior or requests during this meeting. (Vol. IIA at 43).

The damage prevented Mr. Tabesh from doing business at the hotel, and consequently, the bank reacquired the Lodge in an auction. (Vol. IV at 113).

SUMMARY OF THE ARGUMENT

In the instant case, the State presented several pieces of evidence indicating that the fire at issue was the result of arson. However, the State presented insufficient evidence indicating that Appellant started the fire. The placing of Mr. Tabesh's fingerprints was to be expected as he owned and worked at The Lodge. His wife's hysterical conduct was not indicative of guilt but rather indicated that Appellant did not start the fire. Finally, much evidence was presented indicating that the fire was, in fact, started by someone else. This evidence included eyewitness observations noting that someone fled the scene by rooftop.

During the course of trial, the State was improperly allowed to present expert

testimony regarding a comparison of paint thinner purchased from a store and an accelerant used in the fire. There was not enough paint thinner left in a can found at The Lodge to perform an analysis. Consequently, investigators purchased another can of the same brand and performed the testing on it. Where scientific principles were inappropriately applied and where the probative value of the analysis was substantially outweighed by its prejudicial effect, it should not have been admitted.

Finally, in closing the prosecution impermissibly implied that Appellant should have presented evidence regarding receipts not found by police. This comment impermissibly shifted the burden of proof to the defense and so constituted prosecutorial misconduct such that Appellant's motion for a new trial should have been granted.

ARGUMENT

I. INSUFFICIENT EVIDENCE WAS ADDUCED AT TRIAL TO SUSTAIN THE JURY'S CONVICTION ON ONE COUNT OF AGGRAVATED ARSON, A FIRST DEGREE FELONY

I. Standard of Review

"When reviewing any challenge to a trial court's denial of arrest of judgment, [this court] review[s] the evidence and all reasonable inferences that may fairly be drawn therefrom in the light most favorable to the jury verdict. We will sustain the trial court's

decision unless the jury verdict is so inconclusive or so inherently improbable as to an element of the crime that all reasonable minds must entertain a reasonable doubt." *State v. Workman*, 852 P.2d 981, 984 (Utah 1993); *State v. Petree*, 659 P.2d 443, 444 (Utah 1983).

II. Marshaling of Evidence

An Appellant challenging the sufficiency of the evidence to support a conviction "must marshal all of the evidence in support of the [verdict] and then demonstrate that the evidence, including all reasonable inferences drawn therefrom, is insufficient to support the [verdict] against an attack." *State v. Larsen,* 999 P.2d 1252 (Utah App. 2000) (quotations and citation omitted). The following facts are marshaled for the State, in support of the verdict, as required by law. *State v. Pritchett*, 69 P.3d 1278, 1284 (Utah 2003):

1. Mr. Winget testified that Mr. Tabesh remained calm when he indicated the hotel was on fire; he did not immediately call 9-1-1 but instead followed him to room 112. (Vol. IIB at 11, 12).
2. Mr. Tabesh's wife was heard screaming "My husband," as she pointed in the direction of room 112. (Vol. IIB at 16).
3. The fire alarm in room 112 was not working, nor were the fire alarms in 109, 110, or 111. (Vol. IIB at 115; Vol. III at 97-98). The fire alarm in room 121 was broken on

the floor. (Vol. IIB at 152-153).

4. The individual who checked into room 112 did not have any ID and the receipt was too illegible to determine a name or address. (Vol. IIB at 118, 145).

5. Deputy Graves and Sergeant Winterton testified that they did not collect any evidence from room 112. (Vol. IIB at 121, 148). In addition, Officer Clegg testified that he collected the receipt from the nightstand in room 112. (Vol. III at 48).

6. Sergeant Perry found two cans of paint thinner in Mr. Tabesh's basement. (Vol. III at 232).

7. Mr. Tabesh's fingerprints were found on the door to room 112; the receipt for the individual who stayed in room 112; and on the taco bag found on the nightstand in room 112. (Vol. IV at 47, 55, 56).

8. Mr. Tabesh increased the insurance coverage on the North building of The Lodge weeks before it was set on fire. (Vol. IIA at 30).

9. When The Lodge was on the market, Mr. Tabesh did not receive any offers to buy it. (Vol. I 169).

10. While Mr. Tabesh was able to meet his loan payments on the hotel every year, it was only marginally profitable. (Vol. III at 240, 251).

C. Reasonable minds would have reasonable doubt as to Appellant's guilt.

Where an appellant challenges the sufficiency of the evidence to sustain a jury verdict, persuasive authority is found in the jurisprudence regarding a district court's arrest of judgment. *State v. Workman*, 852 P.2d 981 (Utah 1993). To make the necessary showing to justify an arrest of judgment, a defendant must show either "the facts proved or admitted do not constitute a public offense," or "there is other good cause." Utah R. Crim.P. 23. A Court may arrest judgment because the facts proved do not constitute a public offense when, viewed in the light most favorable to the verdict, the facts are "so inconclusive or so inherently improbable as to an element of the crime that reasonable minds must have entertained a reasonable doubt as to that element." *Workman*, 852 P.2d at 984.

Here, while much evidence was adduced suggesting that the fire was the result of arson, there was relatively little evidence indicating that Appellant committed the crime. A jury could readily infer that the fire was caused by arson due to the presence of accelerants, pour spots, and matches. However, alone such does not give rise to the reasonable inference that Appellant committed the arson. To link Appellant to the arson, the State presented evidence that he owned the motel, that he was at the Motel when the fire started, that his fingerprints were on a bag of tacos in room 112, that his fingerprints were on the guest receipt for room 112, that his wife hysterically indicated that Defendant was near the fire, and

that the motel was insured. This evidence does not support a finding, beyond a reasonable doubt, that Appellant committed the crime in question.

It is entirely unsurprising that Appellant was at the Motel when the fire occurred, he worked there and was appropriately in the office. Appellant's fingerprints were on the guest receipt because, as manager, he handled the receipts. No inference relative to guilt may be reasonably drawn from these facts as they are to be expected, are completely consistent with innocence, and are innocuous in nature.

Similarly, it is unsurprising that the motel was insured, in fact it would have been quite imprudent to neglect to insure the property. While the State may argue that it is telling that Appellant increased the insurance coverage on the north building shortly before the fire, this fact must be placed in context. Mr. Sullivan testified that there was nothing unusual about Mr. Tabesh's behavior or requests during the meeting regarding insurance premiums. (Vol. IIA at 43). Moreover, there was a mistake as to valuation of the buildings that was corrected. This correction caused a distinct change in valuation and consequent coverage. While some of the smoke detectors in nearby rooms were not functioning, the smoke detector in room 114 was functioning. Therefore, one cannot reasonably infer that the batteries were out of contact intentionally. Likewise, no inference of guilt should be taken from the fact that paint thinner was found in Appellant's basement where it could not be matched to the

accelerant used in the fire.

Defendant's fingerprints were on a bag of tacos in room 112. This indicates that Defendant had been in the room earlier, but again he owned the motel. There was conflicting testimony as to how these prints were left. Appellant is cognizant of the fact that, in this context, such conflicts must be resolved in the prosecution's favor. Nonetheless, if the jury were to conclude that Mr. Tabesh left his prints on the bag before the fire began, guilt may not be reasonably inferred therefrom. Where Mr. Tabesh owned The Lodge, his prints should be expected to be found. As a part of employment, he often came into contact with the belongings of his guests.

When Appellant's wife saw the fire, she was overcome with fear for her husband's safety. She was crying hysterically. When asked where her husband was, she pointed in the general direction of room 112. However, this was also the general direction of the fire and of the office. Appellant's wife could have been indicating that her husband was in the office or, more likely given her hysterics, trapped in the fire. None of this evidence directly links Defendant to the arson. Furthermore, when put in context, it is indicative of innocence. Even when viewed as a whole, this evidence fails to establish that Appellant committed the crime.

In contrast, there is considerable evidence indicating that Defendant did not start the

fire. Granted, this Court must view all evidence in a light most favorable to the jury's verdict and must draw reasonable inferences from that evidence in favor of the prosecution. Nonetheless, in order to determine what reasonable inferences may be drawn from the evidence, the evidence must be viewed in context. While the evidence must be viewed in a light most favorable to the prosecution, all evidence should be considered and none should be ignored.

Appellant gave the police the receipt filled out by the occupant of room 112. He gave police the money with which the occupant had paid. When he learned of the fire he appropriately called 911 to request assistance. While the State appears to imply that Appellant's wife knew he was in room 112 and perhaps, therefore, knew he was going to burn the motel. This is inconsistent with Mrs. Tabesh's hysterical conduct. Consequently, such an inference may not be reasonably drawn from the facts adduced at trial. The fact that Mrs. Tabesh so seriously feared for her husband's safety indicates that he did not start the fire. Finally, Mr. Tabesh's family was in the motel's office only two doors down from room 112. It would be incongruous for Mr. Tabesh to start a fire so near his family. Finally, individuals were seen fleeing the scene by rooftop shortly after the fire began.

Cases where Utah courts have examined the sufficiency of the evidence after an arson conviction are instructive. In *State v. Span*, 819 P.2d 329 (Utah App. 1991), this Court also

considered a case "close on the issue[] of whether . . . [the defendant] was the perpetrator of the arson." *Id* at 333. There, the Court upheld the defendant's conviction for burning his ex-girlfriend's apartment. In *Span* there was far more evidence linking the defendant to the arson, yet the Court of Appeals still reasoned that the question on identity was a close one. In *Span*, the defendant was upset that the victim broke up with him nine days before the arson; after the break up but before the arson, the defendant twice vandalized the victim's car; the defendant broke into the victim's father's house during this period; the defendant visited the victim at work several times on the evening before the arson and the victim was frightened by these visits; the defendant admitted that he was upset with the victim just hours before the fire; and the defendant admitted driving to the victim's apartment near the time of the fire. Notwithstanding the great amount of evidence against the defendant, the court still stated that it was a close case. In the instant case, there is far less evidence indicating that Defendant lit the fire at The Lodge. Therefore, it stands to reason that since *Span* was a borderline case, the instant case falls short and there is insufficient evidence linking Defendant to the crime.

II. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED A MOTION FOR NEW TRIAL WHERE THE STATE ENGAGED IN PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT.

Appellate courts review "rulings on motions for a mistrial based on prosecutorial misconduct for abuse of discretion." *State v. Jimenez*, 2001 UT App 68 at ¶ 6, 21 P.3d 1142. The standard is met only if the error is "substantial and prejudicial." *State v. Harmon*, 956 P.2d 252, 276 (Utah 1998).

The trial court's denial of a mistrial based on prosecutorial misconduct may be reversed when "[t]he error is substantial and prejudicial such that there is a reasonable likelihood that in its absence, there would have been a more favorable result for the defendant." *State v. Pritchett*, 2003 UT 24, ¶ 10; 69 P.3d 1278, 1281 (Utah 2003). A prosecutor's remarks will be deemed improper and will constitute prosecutorial misconduct if the remarks "called to the juror's attention matters which they would not be justified in considering in reaching a verdict." *State v. Emmett*, 839 P.2d 781, 785 (Utah 1992); quoting *State v. Johnson,* 663 P.2d 48, 51 (Utah 1983).

A. The prosecution's assertion during closing argument impermissibly implied that Appellant had a burden to present evidence, and, therefore, constituted prosecutorial misconduct.

Again, statements constitute prosecutorial misconduct if they "called to the juror's

attention matters which they would not be justified in considering in reaching a verdict." *State v. Emmett*, 839 P.2d 781, 785 (Utah 1992). In the instant case the prosecutor argued as follows during closing argument:

> Even on the other examples that we had that officers went through, every single receipt the prior year-and-a-half, all the receipts they had in the office – and, by the way, Mr. Tabesh said they didn't get all the receipts. This is what we have here. I haven't seen any others brought in.

(Vol. IV at 201). The prosecutor implied that the jury should not only consider but actively infer guilt from the fact that Appellant did not introduce documentary evidence supporting his defense. This inappropriately and impermissibly shifted the burden of proof to the defense. The jury was effectively told that the Appellant (1) should have introduced receipts into evidence and (2) that guilt may be inferred, at least in part, from his failure to do so. However, Utah law places no burden on the defendant to present any evidence in his defense. *State v. Bingham*, 684 P.2d 43, 46 (Utah 1984). This burden never leaves the State. Even if a defendant decides to present no evidence, or even no case at all, the jury may not infer guilt from such a decision. Any inference of guilt shifts the burden to the defense to present evidence to avoid this unconstitutional inference. The Utah Supreme Court has indicated that, in Utah, the burden should never shift from the State. *See Id.* Therefore, the shifting burden caused by the State's misplaced argument was constitutionally impermissible.

Furthermore, in this case, the prosecution called the jurors' attention to the fact that Appellant did not enter certain receipts into evidence. Contrary to the State's implication, the jury was not justified in considering this in reaching a verdict. Therefore, the State engaged in prosecutorial misconduct.

B. The prosecutorial misconduct in the instant case was not harmless; therefore, the trial court abused its discretion when it denied the motion for a new trial.

Prosecutorial misconduct is harmful, and a new trial is warranted, if the resulting error " 'is substantial and prejudicial such that there is a reasonable likelihood that, in its absence, there would have been a more favorable result.' " *State v. Kohl,* 999 P.2d 7 (Utah 2000); *quoting State v. Longshaw,* 961 P.2d 925, 928 (Utah Ct.App.1998). However, in this analysis, "[i]f the conclusion of the jurors is based on their weighing conflicting evidence or evidence susceptible to differing interpretations, there is a greater likelihood that they will be improperly influenced through remarks of counsel." *State v. Troy*, 688 P.2d 483, 486 (Utah 1984). Therefore, "[i]f proof of a defendant's guilt is strong, [courts] will not presume prejudice; if there is less compelling proof, [courts] will more closely scrutinize the prosecutor's conduct." *State v. Callihan*, 55 P.3d 573 (Utah,2002). In this case, the proof was not compelling, such that this court should scrutinize the prosecutor's statement very

closely and a new trial is required.

In the instant case, there was significant evidence indicating that an arson had occurred; however, there was little if any evidence indicating that Appellant was the person who started the fire. As previously detailed, the State presented circumstantial evidence indicating that Appellant was at The Lodge when the fire started; that his fingerprints were found on a taco bag in room112 and the guest receipt for room 112; that his wife hysterically indicated in the direction of room 112 while screaming, "my husband;" and that Appellant had recently increased his insurance on The Lodge. This evidence does not establish "compelling proof" that Appellant started the fire. Therefore, close scrutiny is required and the prosecutorial misconduct cannot be considered harmless.

When this Court looks at the evidence presented at trial as a whole, which has been detailed in full, the State's case had several distinct weaknesses. This is the kind of case that the Utah Supreme Court envisioned when it explained that where a conviction is based on "less compelling proof, [courts] will more closely scrutinize the prosecutor's conduct." *State v. Callihan*, 55 P.3d 573 (Utah,2002). "If the conclusion of the jurors is based on their weighing conflicting evidence or evidence susceptible to differing interpretations, there is a greater likelihood that they will be improperly influenced through remarks of counsel." *State v. Troy*, 688 P.2d 483, 486 (Utah 1984). In this case, where it was at least a close case

and the jurors deliberated several hours before reaching a decision, any burden shifting by the prosecution likely factored into the conviction and was therefore harmful.

III. THE COURT IMPROPERLY PERMITTED EXPERT TESTIMONY REGARDING INCONCLUSIVE TESTING OF ACCELERANTS FOUND AT THE LODGE.

Jennifer McNair, an employee with the Utah State Crime Lab was permitted to testify that she performed tests on the two cans of accelerant found at The Lodge. One can was excluded by the testing; it was not the accelerant used in the fire. The other can did not have enough contents to test. Ms. McNair purchased another can of the same brand from a store and performed the test on the store-bought can. This test was inconclusive. Nonetheless, Ms. McNair was allowed to testify to the foregoing facts over Appellant's timely objection on the basis of relevance, and Rules 403, 701, and 702 of the Utah Rules of Evidence. (Vol. IV at 14-20).

Utah courts have long recognized and employed a three step analysis to determine whether expert testimony is admissible. The court "must determine whether scientific principles and techniques underlying expert's testimony are inherently reliable; court must determine that scientific principles or techniques at issue have been properly applied to facts of particular case by sufficiently qualified experts; and court must determine whether

proffered scientific evidence will be more probative than prejudicial. Rules of Evid., Rules 403, 702." *State v. Crosby*, 927 P.2d 638 (Utah 1996); *see also State v. Rugebregt*, 965 P.2d 518 (Utah App. 1998). Therefore, before the prosecution was entitled to offer the expert testimony regarding accelerant comparison it was required to show that the testimony's prejudicial effect does not substantially outweigh its probative value.

A. The probative value of the subject expert testimony was substantially outweighed by its prejudicial effect.

Courts have long recognized the fact that juries tend to put an undeserved weight on any evidence that is presented in a scientific light. *People v. Collins*, 438 P.2d 33 (Cal. 1968); cited with approval by *State v. Rammel*, 721 P.2d 498 (Utah 1986). In the context of Utah Rule of Evidence 403, this can have a disturbing effect as prejudicial evidence becomes even more harmful when presented in a scientific light.

Utah Rule of Evidence 403 states in pertinent part, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." In the context of the case at hand, any expert testimony concerning accelerant comparison should have been excluded because its minimal probative value was substantially outweighed by its prejudice to the

defense.

Blacks Law Dictionary defines the term "probative evidence" as " testimony carrying quality of proof and having fitness to induce conviction of truth, consisting of fact and reason co-operating as co-ordinate factors." Nolan J., Nolan-Haley J., Black's Law Dictionary With Pronunciations, West Publishing, 1990; *see also Globe Indemnity Co. v. Daviess*, 47 SW.2d 990, 992 (Ky. 1932). In the instant case, a comparison was made between a store-bought can of paint thinner and the accelerant used in the fire. Moreover, the results of this comparison were inconclusive. It is irrelevant whether the accelerant used in the fire matched paint thinner that an investigator purchased from a store. Moreover, insufficient evidence was presented establishing that the store-bought paint thinner had the same chemical composition as the thinner found at the Lodge. Consequently, the probative value of this evidence was minimal, if present at all.

In contrast, the prejudicial effect of this testimony was considerable such that the evidence should have been excluded. Courts have long recognized that evidence presented in a scientific light carries an undeserved weight with juries. *People v. Collins*, 438 P.2d 33 (Cal. 1968); *cited with approval by State v. Rammel*, 721 P.2d 498 (Utah 1986). Herein lies the problem. Even though the expert testimony could not compare the accelerant found at The Lodge with that used in the fire, there was a propensity for a jury to place undue weight

on the testimony due to its scientific nature. Moreover, the State repeatedly noted that the store-bought paint thinner was not excluded, the clear implication being that the accelerant found at the lodge could have been used in the fire. This prejudiced the defense, served to confuse the jury and should not have been permitted pursuant to Rule 403 of the Utah Rules of Evidence.

Moreover, this Court "must determine whether scientific principles and techniques underlying expert's testimony are inherently reliable; court must determine that scientific principles or techniques at issue have been properly applied to facts of particular case by sufficiently qualified experts . . . ." *State v. Crosby*, 927 P.2d 638 (Utah 1996); *see also State v. Rugebregt*, 965 P.2d 518 (Utah App. 1998). In this case, where there was insufficient evidence indicating that the paint thinner found at the lodge and paint thinner bought from a store had the same chemical composition, scientific principles were incorrectly applied and the expert testimony should not have been admitted on this basis also.

CONCLUSION AND PRECISE RELIEF SOUGHT

Based upon the foregoing, Appellant respectfully requests this Court to reverse his conviction.

REQUEST FOR ORAL ARGUMENT

Counsel for Appellant requests oral argument in the above matter.

RESPECTFULLY SUBMITTED this 30 day of December, 2003.

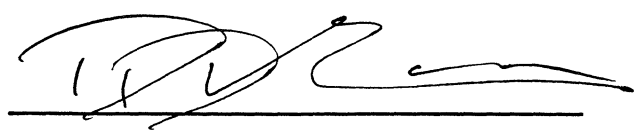
YENGICH, RICH & XAIZ
Attorneys for Defendant/Appellant

By _____
RONALD J. YENGICH

CERTIFICATE OF SERVICE

I hereby declare that I mailed/delivered two true and correct copies of the foregoing Appellant's Opening Brief, postage prepaid, this 30 day of December, 2003, to:

J. FREDERICK VOROS, JR.
Assistant Attorney General
Criminal Appeals Division
160 East 300 South, Sixth Floor
Salt Lake City, Utah 84114



ADDENDUM I

DEREK P. PULLAN, #6633
Wasatch County Attorney
THOMAS L. LOW, #6601
Deputy Wasatch County Attorney
805 West 100 South
Heber City, UT 84032
Telephone: (435)654-2909
Fax: (435)654-2947

IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR WASATCH COUNTY, STATE OF UTAH

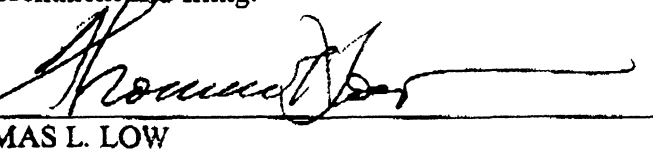
STATE OF UTAH, Plaintiff, vs. **MAZHAR TABESH** 90 North Main Street Heber City, UT 84032 DOB: 05/27/1963, Defendant.	**INFORMATION** CASE NO. 021500182 Warrant Judge DONALD J. EYRE, JR.

The undersigned THOMAS L. LOW, Deputy Wasatch County Attorney, under oath states on information and belief that the defendant, in Wasatch County, State of Utah, committed the following crime(s):

COUNT 1: **AGGRAVATED ARSON**, a first degree felony, 76-6-103, as follows: That Mazhar Tabesh on or about July 21, 2002, by means of fire or explosives, intentionally and unlawfully damaged:
(a) a habitable structure; or
(b) any structure or vehicle when any person not a participant in the offense was in the structure or vehicle.

This information is based on evidence obtained from the following witness(es):
Det Mike Clegg, HCPD
Sgt. Jason Bradley, HCPD
Sgt. Jeff Winterton, WCSO
Deputy Mike Graves, WCSO
Officer Rick Allred, HCPD
Chief Edward Rhoades, HCPD
Chief Robert Morris, WCSFD
Steve Ivie, Utah State Fire Marshall
Jim Dudinski, Utah State Fire Marshall

Authorized 19 September 2002
for presentment and filing:

By 
THOMAS L. LOW
Deputy Wasatch County Attorney

ADDENDUM II

4TH DISTRICT COURT - HEBER COURT
WASATCH COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. MAZHAR TABESH, Defendant.	: : : : : : : :	MINUTES SENTENCE, JUDGMENT, COMMITMENT Case No: 021500182 FS Judge: DONALD J. EYRE Date: April 28, 2004

PRESENT
Clerk: diannb
Prosecutor: LOW, THOMAS L
Defendant
Defendant's Attorney(s): YENGICH, RONALD J.

DEFENDANT INFORMATION
Date of birth: May 27, 1963
Audio
Tape Count: 1:35:40

CHARGES

1. AGGRAVATED ARSON - 1st Degree Felony
Plea: Not Guilty - Disposition: 02/12/2004 Guilty

SENTENCE PRISON

Based on the defendant's conviction of AGGRAVATED ARSON a 1st Degree Felony, the defendant is sentenced to an indeterminate term of not less than five years and which may be life in the Utah State Prison.
The prison term is suspended.

Case No: 021500182
Date: Apr 28, 2004

SENTENCE JAIL

Based on the defendant's conviction of AGGRAVATED ARSON a 1st Degree Felony, the defendant is sentenced to a term of 365 day(s)

SENTENCE JAIL RELEASE TIME NOTE

Defendant may be given the privilege of work release after he has served 90 days.

SENTENCE FINE

Charge # 1
Fine: $1850.00
Suspended: $0.00
Surcharge: $850.00
Due: $1850.00

Total Fine: $1850.00
Total Suspended: $0
Total Surcharge: $850.00
Total Principal Due: $1850.00
Plus Interest
The fine is to be paid in full by 04/28/2007.

SENTENCE TRUST

The defendant is to pay the following:
Restitution: Amount: $56000.00 Plus Interest
Pay in behalf of: COMMUNITY FIRST NATIONAL BANK

Restitution: Amount: $79434.00
Pay in behalf of: EMC

The amount of Adult Probation & Parole
Adult Probation & Parole

Case No: 021500182
Date: Apr 28, 2004

SENTENCE TRUST NOTE

Mr. Yengich is allowed 90 days to request a restitution hearing, if the amounts are disputed.

ORDER OF PROBATION

The defendant is placed on probation for 36 month(s).
Probation is to be supervised by Adult Probation and Parole.
Defendant to serve 365 day(s) jail.
Defendant is to report by May 9, 2004 by 5 p.m..

Defendant is to pay a fine of 1850.00 which includes the surcharge.
Interest may increase the final amount due.
Pay fine on or before April 28, 2007.

PROBATION CONDITIONS

Usual and ordinary conditions required by the Department of Adult Probation & Parole.
Defendant is to make himself/herself available to Adult Probation & Parole and the Court when requested to do so
Defendant is to advise Adult Probation & Parole and the Court of a current address at all times while on probation.

Dated this 28th day of April, 2004.

STATE OF UTAH
FOURTH DISTRICT COURT
WASATCH COUNTY

DONALD J. EYRE
District Court Judge

ADDENDUM III

RONALD J. YENGICH, #3580
YENGICH, RICH & XAIZ
Attorneys for Defendant
175 East 400 South, Suite 400
Salt Lake City, Utah 84111
Telephone: (801) 355-0320

IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR WASATCH COUNTY, STATE OF UTAH

THE STATE OF UTAH,	
Plaintiff,	**MOTION FOR NEW TRIAL**
vs.	
MAZHAR TABESH,	Case No. 021500182
Defendant.	JUDGE DONALD J. EYRE

Defendant, MAZHAR TABESH, by and through his counsel of record, RONALD J. YENGICH, pursuant to Rule 24 of the Utah Rules of Criminal Procedure and based upon accompanying memorandum, hereby moves this Court to order a New Trial in the above-captioned case.

RESPECTFULLY SUBMITTED this 27 day of April 2004.

YENGICH, RICH & XAIZ
Attorneys for Defendant

by _____
RONALD J. YENGICH

CERTIFICATE OF DELIVERY

I hereby declare that I caused to be mailed/delivered a true and correct copy of the foregoing Motion for New Trial, this _____ day of_____2004, to the following:

Thomas L. Low
Deputy County Attorney
805 West 100 South
Heber City, Utah 84032

_____

RONALD J. YENGICH, #3580
YENGICH, RICH & XAIZ
Attorneys for Defendant
175 East 400 South, Suite 400
Salt Lake City, Utah 84111
Telephone: (801) 355-0320

IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR WASATCH COUNTY, STATE OF UTAH

THE STATE OF UTAH,	
Plaintiff,	**MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR NEW TRIAL**
vs.	
MAZHAR TABESH,	Case No. 021500182
Defendant.	JUDGE DONALD J. EYRE

COMES NOW Defendant, MAZHAR TABESH, by and through his counsel of record, RONALD J. YENGICH, and submits this Memorandum in Support of Defendant's Motion for New Trial.

STATEMENT OF MATERIAL FACTS

A trial was held in the instant case during the second week of February, 2004. At the conclusion of trial proceedings, Defendant was convicted of Aggravated Arson. The following facts were produced at trial.[1] On July 21, 2002, a fire broke out at the Alpine Lodge Motel in

[1]A trial transcript has not yet been prepared; however, as this honorable court presided over the trial proceedings, the basic facts presented at trial will likely not be in dispute.

Heber, Utah. Arson investigators concluded that the fire was the result of arson. This conclusion was based on burn patterns consistent with an act of arson and test results indicating the presence of an ignitable liquid.

Defendant owned the Alpine Lodge Motel and was in the motel's office, along with his family, when the fire broke out. Mr. Burke Winget noticed smoke as he drove by the motel. He ran into the office and informed Mr. Tabesh that the motel was on fire. Upon learning of the fire, Mr. Tabesh called 911. Mr. Winget then began trying to put out the fire. He was approached by Mr. Tabesh's wife and mother-in-law, who were both crying hysterically. Mr. Tabesh was not in the immediate vicinity. When asked where Mr. Tabesh was, Mrs. Tabesh, still hysterical, pointed towards the fire and in the direction of room 112.

Firefighters arrived and extinguished the fire. The motel consists of two buildings, a north building and a south building. The north building suffered considerable damage, mainly on the upper levels. The south building was largely unaffected. During the subsequent arson investigation, officers concentrated on room 112 in the north building. This room is two doors down from the office where Mr. Tabesh and his family were located when the fire began. There was some kind of fluid in room 112 going from the closet to the bed. This fluid may have been an ignitable chemical of some sort. Mr. Tabesh informed the officers that a guest was staying in room 112 that night. Mr. Tabesh retrieved the receipt that the guest had filled out. Unfortunately, the receipt was illegible and the occupant's identity could not be established. Mr. Tabesh explained that the occupant had paid cash up-front and that he was, consequently, not overly concerned with the occupant's identity since his bill was already paid in full. Mr. Tabesh

gave the officers the cash he received from the occupant and the motel receipt. Mr. Tabesh also gave a detailed description of the occupant.

At the time of the fire, there was still an outstanding balance on the motel's mortgage and Mr. Tabesh had a second job. The motel was insured. The foregoing facts were addressed by both parties during closing arguments. However, in closing, counsel for the State improperly urged the jury to consider inadmissable and unpresented material in deliberations. More specifically, counsel argued, over defense counsel's timely objection, that the jury should consider the fact that Mr. Tabesh did not present documentation in support of his defense as an indication of guilt. This motion is based primarily on this improper assertion.

ARGUMENT

I. A NEW TRIAL IS WARRANTED IN THIS CASE WHERE THE STATE ENGAGED IN PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT.

Utah Rule of Criminal Procedure 24 governs motions for new trial. The rule reads in pertinent part as follows: "The court may . . . grant a new trial in the interest of justice if there is any error or impropriety which had a substantial adverse effect upon the rights of a party." Utah R. Crim. P. 24. Utah courts have repeatedly recognized that prosecutorial misconduct during trial proceedings may serve as a ground for ordering a new trial. *See e.g. State v. Saunders*, 992 P.2d 951 (Utah 1999); *State v. Callahan*, 55 P.3d 573 (Utah 2002). A prosecutor's remarks will be deemed improper and will constitute prosecutorial misconduct if the remarks "called to the juror's attention matters which they would not be justified in considering in reaching a verdict."

State v. Emmett, 839 P.2d 781, 785 (Utah 1992); quoting *State v. Johnson,* 663 P.2d 48, 51 (Utah 1983). Improper remarks must be deemed harmful if the resulting error " 'is substantial and prejudicial such that there is a reasonable likelihood that, in its absence, there would have been a more favorable result.' " *State v. Kohl,* 999 P.2d 7 (Utah 2000); quoting *State v. Longshaw,* 961 P.2d 925, 928 (Utah Ct.App.1998); *but see State v. Tillman*, 750 P.2d 546 (Utah 1987) (in case seeking new trial based on prosecutorial misconduct, "[A]n otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt."). *State v. Callahan*, 55 P.3d 573, 593 (Utah 2002).

A. The prosecution's assertion during closing argument impermissibly implied that Defendant had a burden to present evidence and, therefore, constituted prosecutorial misconduct.

Again, statements constitute prosecutorial misconduct if they "called to the juror's attention matters which they would not be justified in considering in reaching a verdict." *State v. Emmett*, 839 P.2d 781, 785 (Utah 1992). The prosecutor argued that the jury should not only consider but actively infer guilt from the fact that Defendant did not introduce documentary evidence supporting his defense. This inappropriately and impermissibly shifted the burden of proof to the defense. The jury was effectively told that the Defendant (1) should have introduced documents into evidence and (2) that guilt may be inferred from his failure to do so. However, Utah law places no burden on the defendant to present any evidence in his defense. *State v. Bingham*, 684 P.2d 43, 46 (Utah 1984). The burden in this regard never leaves the State; even if

a defendant decides to present no evidence, or even no case at all, the jury may not infer guilt from such a decision. Any inference of guilt shifts the burden to the defense to present evidence to avoid this unconstitutional inference. The Utah Supreme Court has indicated that, in Utah, the burden should never shift from the State. *See* id. Therefore, the shifting burden caused by the State's misplaced argument was constitutionally impermissible.

Furthermore, in this case, the prosecution called the jurors' attention to the fact that Defendant did not enter certain documents into evidence. Contrary to the State's implication, the jury was not justified in considering this in reaching a verdict. Therefore, the State engaged in prosecutorial misconduct.

B. The prosecutorial misconduct in the instant case was not harmless; therefore, a new trial is warranted.

Prosecutorial misconduct is harmful, and a new trial is warranted, if the resulting error " 'is substantial and prejudicial such that there is a reasonable likelihood that, in its absence, there would have been a more favorable result.' " *State v. Kohl,* 999 P.2d 7 (Utah 2000); *quoting State v. Longshaw,* 961 P.2d 925, 928 (Utah Ct.App.1998). However, in this analysis, "[i]f the conclusion of the jurors is based on their weighing conflicting evidence or evidence susceptible to differing interpretations, there is a greater likelihood that they will be improperly influenced through remarks of counsel." *State v. Troy*, 688 P.2d 483, 486 (Utah 1984). Therefore, "[i]f proof of a defendant's guilt is strong, [courts] will not presume prejudice; if there is less compelling proof, [courts] will more closely scrutinize the prosecutor's conduct." *State v.*

Callihan, 55 P.3d 573 (Utah,2002). In this case, the proof was not compelling, such that this court should scrutinize the prosecutor's statement very closely and a new trial is required.

In the instant case, there was significant evidence indicating that an arson had occurred; however, there was relatively little evidence indicating that Defendant was the person who started the fire. The State presented evidence that Defendant owned the motel, that he was at the Motel when the fire started, that Defendant's fingerprints were on a bag of tacos in room 112, that Defendant's fingerprints were on the guest receipt for room 112, that Defendant's wife hysterically indicated that Defendant was near the fire, and that the motel was insured. This evidence does not establish "compelling proof" that Defendant started the fire. Therefore, close scrutiny is required and the prosecutorial misconduct cannot be considered harmless.

It is entirely unsurprising that Defendant was at the Motel when the fire occurred, he worked there and was appropriately in the office. Defendant's fingerprints were on the guest receipt because, as manager, he handled the receipts. Similarly, it is unsurprising that the motel was insured, in fact it would have been quite imprudent to neglect to insure the property. Defendant's fingerprints were on a bag of tacos in room 112. This indicates that Defendant had been in the room earlier, but again he owned the motel. It is not surprising that he was in the room. When Defendant's wife saw the fire, she was overcome with fear for her husband's safety. She was crying hysterically. When asked where her husband was, she pointed in the general direction of room 112. However, this was also the general direction of the fire and of the office. None of this evidence directly linked Defendant to the arson. Furthermore, when put in context, none of this evidence is particularly compelling circumstantial evidence. Even when

viewed as a whole, this evidence fails to establish "compelling proof" that Defendant committed the crime.

In contrast, considerable evidence was presented indicating that Defendant did not start the fire. He gave the police the receipt filled out by the occupant of room 112. He gave police the money with which the occupant had paid. When Defendant learned of the fire he appropriately called 911 to request immediate assistance. While the State implied that Defendant's wife knew he was in room 112 and perhaps, therefore, knew he was going to burn the motel. This is inconsistent with Mrs. Tabesh's hysterical conduct. The fact that Mrs. Tabesh so seriously feared for her husband's safety indicates that he did not start the fire. Finally, Mr. Tabesh's family was in the motel's office only two doors down from room 112. It would be strange indeed for Mr. Tabesh to start a fire so near his family.

When this court looks at the evidence presented at trial as a whole, the State's case had several distinct weaknesses. This is the kind of case that the Utah Supreme Court envisioned when it explained that where a conviction is based on "less compelling proof, [courts] will more closely scrutinize the prosecutor's conduct." *State v. Callihan*, 55 P.3d 573 (Utah,2002). "If the conclusion of the jurors is based on their weighing conflicting evidence or evidence susceptible to differing interpretations, there is a greater likelihood that they will be improperly influenced through remarks of counsel." *State v. Troy*, 688 P.2d 483, 486 (Utah 1984). In this case, there was conflicting evidence such that there was a reasonable likelihood that the jury's verdict was influenced by the prosecutorial misconduct at issue. Therefore, the error was harmful and a new trial should be ordered as a result.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests this Court to order a new trial in the instant case.

RESPECTFULLY SUBMITTED this ____ day of April, 2004.

YENGICH, RICH & XAIZ
Attorneys for Defendant

by _____
RONALD J. YENGICH

CERTIFICATE OF DELIVERY

I hereby declare that I caused to be mailed/delivered a true and correct copy of the foregoing Memorandum in Support of Defendant's Motion for New Trial, this _____ day of _____, 2004, to the following:

Thomas L. Low
Deputy County Attorney
805 West 100 South
Heber City, Utah 84032

_____

RONALD J. YENGICH, #3580
YENGICH, RICH & XAIZ
Attorneys for Defendant
175 East 400 South, Suite 400
Salt Lake City, Utah 84111
Telephone: (801) 355-0320

IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR WASATCH COUNTY, STATE OF UTAH

THE STATE OF UTAH,	
	AFFIDAVIT OF RONALD YENGICH
Plaintiff,	
vs.	
	Case No. 021500182
MAZHAR TABESH,	
Defendant.	JUDGE DONALD J. EYRE

Ronald J. Yengich being first duly sworn on oath, deposes and states as follows:

1. My name is Ronald Yengich. I am over 18 years of age and fully competent to testify as a witness in a court of law. I have personal knowledge of the facts set forth herein.

2. I am counsel of record and represent Mazhar Tabesh in the above-captioned case.

3. I represented Mr. Tabesh at trial and was personally present during the course of trial, which was held during the second week of February, 2004.

4. I was personally present during the prosecution's closing argument in the trial of the above-captioned case.

5. During closing argument, the State argued that the jury should consider the fact that Mr. Tabesh did not present documentation in support of his defense as an indication of guilt.

6. When the State made this argument, I personally objected in a timely manner on the basis that the argument constituted prosecutorial misconduct and that a new trial was, therefore, warranted.

7. This objection was overruled and the motion for new trial was, at that time, denied.

DATED this 27 day of April, 2004.

Ronald J. Yengich

Subscribed and sworn to before me this 27 day of April, 2004.

My Commission Expires:

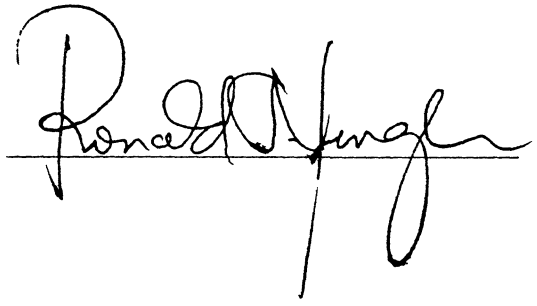
ANNA CHU
NOTARY PUBLIC - STATE OF UTAH
175 EAST 400 SOUTH, STE 400
SALT LAKE CITY UT 84111
My Comm. Exp. 03/30/2007

Notary Public in and for said County and State

CERTIFICATE OF DELIVERY

I hereby declare that I caused to be mailed/delivered a true and correct copy of the foregoing Affidavit, this 27 day of April, 2004, to the following:

Thomas L. Low
Deputy County Attorney
805 West 100 South
Heber City, Utah 84032



ADDENDUM IV

4TH DISTRICT COURT – HEBER COURT
WASATCH COUNTY, STATE OF UTAH

STATE OF UTAH,	)	
	)	MINUTES
Plaintiff,	)	ORAL ARGUMENT – MOTION HEARING
	)	ORDER
vs.	)	
	)	Case No: 021500182 FS
MAZHAR TABESH,	)	
	)	Judge: DONALD J. EYRE
Defendant.	)	Date: June 4, 2004.

PRESENT
Clerk: diannb
Prosecutor: LOW , THOMAS L
Defendant
Defendant's Attorney(s): Yengich, Ronald J.

DEFENDANT INFORMATION
Date of birth: May 27, 1963
Audio
Tape Count: 3:17:00

CHARGES
1. AGGRAVATED ARSON – 1st Degree Felony
Plea: Not Guilty – Disposition: 02/12/2004 Guilty

HEARING

This is the time set for oral argument on Defendant's Motion for a New Trial.

Mr. Yengich addressed the Court and argued on behalf of the defendant.

Response and argument by Mr. Low.

Brief Response by Mr. Yengich.

Both would submit.

In this matter, the Court after hearing argument and after reviewing the file, will deny the Defendant's Motion for a New Trial.

Mr. Yengich filed a Certificate of Probable Cause in open court and argued on behalf of the defendant.

Argued and responded to by Mr. Low, moving the Court to proceed at this time. Mr. Low asked that the Court not issue the Certificate of Probable Cause.

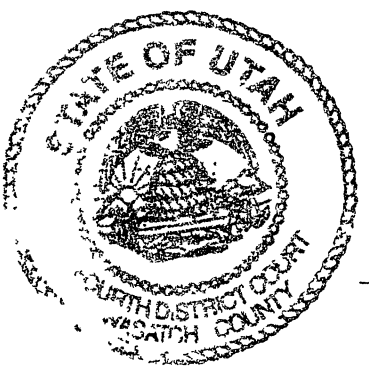
Response by Mr. Yengich.

Both would submit.

In this matter, the Court will Deny the issuing of the Certificate of Probable Cause at this time. Counsel may bring the matter up with the Court of Appeals.

Until a ruling is done by the Utah Court of Appeals, the defendant is to be detained. Mr. Yengich may petition the Court for his release at a later date.

It is so ORDERED this 25 day of June, 2004.



DONALD J. EYRE
Fourth Judicial District Court Judge

CERTIFICATE OF DELIVERY

I hereby declare that I caused to be mailed/delivered a true and correct copy of the foregoing Minutes: Oral Argument – Motion Hearing; Order, postage prepaid, this 25th day of June, 2004, to:

Thomas L. Low
Deputy County Attorney
805 West 100 South
Heber City, Utah 84032

Myrlene Hendrickson

4TH DISTRICT COURT - HEBER COURT
WASATCH COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff,	:	MINUTES ORAL ARGUMENT- MOTION HEARING
vs.	:	Case No: 021500182 FS
MAZHAR TABESH, Defendant.	:	Judge: DONALD J. EYRE Date: June 4, 2004

PRESENT
Clerk: diannb
Prosecutor: LOW, THOMAS L
Defendant
Defendant's Attorney(s): YENGICH, RONALD J.

DEFENDANT INFORMATION
Date of birth: May 27, 1963
Audio
Tape Count: 3:17:00

CHARGES

1. AGGRAVATED ARSON - 1st Degree Felony
Plea: Not Guilty - Disposition: 02/12/2004 Guilty

HEARING

This is the time set for oral argument on Defendant's Motion for a New Trial.
Mr. Yengich addressed the Court and argued on behalf of the defendant.
Response and argued by Mr. Low.
Brief response by Mr. Yengich.
Both would submit.
In this matter, the Court after hearing argument and after reviewing the file, will deny the Defendant's Motion for a New Trial.
Mr. Yengich filed a Certificate of Probable Cause in open court and argued on behalf of the defendant.
Argued and responded to by Mr. Low, moving the Court to proceed at this time. Mr. Low asked that the Court not issue the Certificate

Case No: 021500182
Date: Jun 04, 2004

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of Probable Cause.
Response by Mr. Yengich.
Both would submit.
In this matter, the Court will deny the issuing of the Certificate of Probable Cause at this time. Counsel may bring the matter up with the Court of Appeals.
Until a ruling is done by the Utah Court of Appeals, the defendant is to be detained. Mr. Yengich may petition the Court for his release at a later date.

ADDENDUM V

RONALD J. YENGICH, #3580
YENGICH, RICH & XAIZ
Attorneys for Defendant
175 East 400 South, Suite 400
Salt Lake City, Utah 84111
Telephone: (801) 355-0320

IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR WASATCH COUNTY, STATE OF UTAH

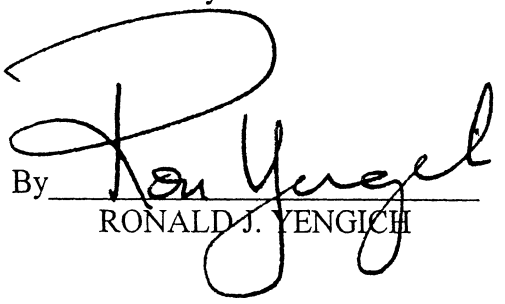
THE STATE OF UTAH,	
	NOTICE OF APPEAL
Plaintiff,	
vs.	
	Case No. 021500182
MAZHAR TABESH,	
Defendant.	JUDGE DONALD J. EYRE

Defendant/Appellant, Mazhar Tabesh, by and through his attorney of record, Ronald J. Yengich, hereby gives notice of his intent to appeal several of this Honorable Court's rulings in the above captioned case. The Defendant is the party taking the instant appeal. The appeal will be taken from the Fourth District Court, the Honorable Donald J. Eyre presiding. The instant appeal will be taken to the Utah Supreme Court, which has relegated the appeal to the Utah Court of Appeals. The following issues and orders will be raised on appeal: Defendant will appeal this Court's denial of Defendant's Motion to Dismiss, which was filed shortly after the preliminary hearing in the instant case; Defendant will appeal his ultimate conviction for Aggravated Arson, including but not limited to whether sufficient evidence was presented at trial to substantiate the jury's guilty verdict and other trial issues that may become apparent once the trial transcript is prepared; and Defendant will appeal this Court's denial of his motion for new trial. Regarding a

related but distinct issue, Defendant will appeal this Court's denial of his Petition for Certificate of Probable Cause.

RESPECTFULLY SUBMITTED this 30 day of June, 2004.

YENGICH, RICH & XAIZ
Attorneys for Defendant



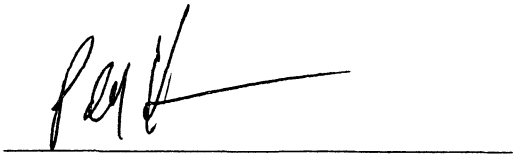
By _____
RONALD J. YENGICH

CERTIFICATE OF DELIVERY

I hereby declare that I caused to be mailed/delivered a true and correct copy of the foregoing Notice of Appeal, this 30 day of June, 2004, to the following:

Thomas L. Low
Deputy County Attorney
805 West 100 South
Heber City, Utah 84032

Clerk of the Court
Utah Court of Appeals
450 South State Street, Fifth Floor
Salt Lake City, Utah 84111



ADDENDUM VI

§§ 76-6-103. Aggravated arson

(1) A person is guilty of aggravated arson if by means of fire or explosives he intentionally and unlawfully damages:

(a) a habitable structure; or

(b) any structure or vehicle when any person not a participant in the offense is in the structure or vehicle.

(2) Aggravated arson is a felony of the first degree.

Laws 1973, c. 196, §§ 76-6-103; Laws 1986, c. 59, §§ 2.

§§ 78-2a-3. Court of Appeals jurisdiction

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

(a) to carry into effect its judgments, orders, and decrees; or

(b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, School and Institutional Trust Lands Board of Trustees, Division of Forestry, Fire and State Lands actions reviewed by the executive director of the Department of Natural Resources, Board of Oil, Gas, and Mining, and the state engineer;

(b) appeals from the district court review of:

(i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and

(ii) a challenge to agency action under **Section 63-46a-12.1**;

(c) appeals from the juvenile courts;

(d) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

(e) appeals from a court of record in criminal cases, except those involving a conviction or charge of a first degree felony or capital felony;

(f) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;

(g) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons and Parole except in cases involving a first degree or capital felony;

(h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, parent-time, visitation, adoption, and paternity;

(i) appeals from the Utah Military Court; and

(j) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Title 63, Chapter 46b, Administrative Procedures Act, in its review of agency adjudicative proceedings.

Laws 1986, c. 47, §§ 46; Laws 1987, c. 161, §§ 304; Laws 1988, c. 73, §§ 1; Laws 1988, c. 210, §§ 141; Laws 1988, c. 248, §§ 8; **Laws 1990, c. 80, §§ 5; Laws 1990, c. 224, §§ 3; Laws 1991, c. 268, §§ 22; Laws 1992, c. 127, §§ 12; Laws 1994, c. 13, §§ 45; Laws 1995, c. 299, §§ 47, eff. May 1, 1995; Laws 1996, c. 159, §§ 19, eff. July 1, 1996; Laws 1996, c. 198, §§ 49, eff. July 1, 1996; Laws 2001, c. 255, §§ 20, eff. April 30, 2001; Laws 2001, c. 302, §§ 2, eff. April 30, 2001.**

§§ 78-2-2. Supreme Court jurisdiction

(1) The Supreme Court has original jurisdiction to answer questions of state law certified by a court of the United States.

(2) The Supreme Court has original jurisdiction to issue all extraordinary writs and authority to issue all writs and process necessary to carry into effect its orders, judgments, and decrees or in aid of its jurisdiction.

(3) The Supreme Court has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) a judgment of the Court of Appeals;

(b) cases certified to the Supreme Court by the Court of Appeals prior to final judgment by the Court of Appeals;

(c) discipline of lawyers;

(d) final orders of the Judicial Conduct Commission;

(e) final orders and decrees in formal adjudicative proceedings originating with:

(i) the Public Service Commission;

(ii) the State Tax Commission;

(iii) the School and Institutional Trust Lands Board of Trustees;

(iv) the Board of Oil, Gas, and Mining;

(v) the state engineer; or

(vi) the executive director of the Department of Natural Resources reviewing actions of the Division of Forestry, Fire and State Lands;

(f) final orders and decrees of the district court review of informal adjudicative proceedings of agencies under Subsection (3)(e);

(g) a final judgment or decree of any court of record holding a statute of the United States or this state unconstitutional on its face under the Constitution of the United States or the Utah Constitution;

(h) interlocutory appeals from any court of record involving a charge of a first degree or capital felony;

(i) appeals from the district court involving a conviction or charge of a first degree felony or capital felony;

(j) orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction; and

(k) appeals from the district court of orders, judgments, or decrees ruling on legislative subpoenas.

(4) The Supreme Court may transfer to the Court of Appeals any of the matters over which the Supreme Court has original appellate jurisdiction, except:

(a) capital felony convictions or an appeal of an interlocutory order of a court of record involving a charge of a capital felony;

(b) election and voting contests;

(c) reapportionment of election districts;

(d) retention or removal of public officers;

(e) matters involving legislative subpoenas; and

(f) those matters described in Subsections (3)(a) through (d).

(5) The Supreme Court has sole discretion in granting or denying a petition for writ of certiorari for the review of a Court of Appeals adjudication, but the Supreme Court shall review those cases certified to it by the Court of Appeals under Subsection (3)(b).

(6) The Supreme Court shall comply with the requirements of Title 63, Chapter 46b, Administrative Procedures Act, in its review of agency adjudicative proceedings.

Laws 1986, c. 47, §§ 41; Laws 1987, c. 161, §§ 303; Laws 1988, c. 248, §§ 5; Laws 1989, c. 67, §§ 1; **Laws 1992, c. 127, §§ 11; Laws 1994, c. 191, §§ 2; Laws 1995, c. 267, §§ 5, eff. May 1, 1995; Laws 1995, c. 299, §§ 46, eff. May 1, 1995; Laws 1996, c. 159, §§ 18, eff. July 1, 1996; Laws 2001, c. 302, §§ 1, eff. April 30, 2001.**

Utah Rules of Criminal Procedure Rule 23

RULE 23. ARREST OF JUDGMENT

At any time prior to the imposition of sentence, the court upon its own initiative may, or upon motion of a defendant shall, arrest judgment if the facts proved or admitted do not constitute a public offense, or the defendant is mentally ill, or there is other good cause for the arrest of judgment. Upon arresting judgment the court may, unless a judgment of acquittal of the offense charged is entered or jeopardy has attached, order a commitment until the defendant is charged anew or retried, or may enter any other order as may be just and proper under the circumstances.

Utah Rules of Evidence, Rule 403

RULE 403. EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Utah Rules of Evidence, Rule 701

RULE 701. OPINION TESTIMONY BY LAY WITNESSES

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

[Amended effective October 1, 1992.]

ADVISORY COMMITTEE NOTE

This rule is the federal rule, verbatim, and is substantially the same as Rule 19, Utah Rules of Evidence (1971). Rule 56(1), Utah Rules of Evidence (1971), contained similar language.

Utah Rules of Evidence, Rule 702

RULE 702. TESTIMONY BY EXPERTS

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

ADVISORY COMMITTEE NOTE

This rule is the federal rule, verbatim. Rule 56(2), Utah Rules of Evidence (1971), was substantially the same.